Supreme Court, U.S.
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No. 02-1157

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL ENRIGHT,

Petitioner,

v.

SOLAR TURBINES INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

PAUL ENRIGHT
1194 Greenfield Dr.
El Cajon, CA 92021
Home (619) 447-4194
Pager (619) 682-2886

Pro Se Petitioner

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REPLY BRIEF FOR PETITIONER

The petition presents three questions of substantial importance to the developing law under the ADA and the protection of disabled individuals in the workplace. The first is whether the EEOC Interpretive Guidance on the *Definition of the Term "Disability"* February 2000, is valid and should be followed in determining if an individual is substantially limited in the ability to engage in work under the ADA. The second is whether the Federal Rule of Evidence 702 was properly applied in considering the admittance and evaluation of expert testimony. This expert testimony would have assisted in the determination of whether Petitioner's impairment constitutes a disability under the ADA. The Ninth Circuit held that Enright's vocational rehabilitation counselor did not qualify as an expert witness, despite the fact that he had previously testified as a vocational expert. The third question is whether an arbitrator's decision under a Collective Bargaining Agreement is admissible evidence in an ADA case, where the arbitrator exceeded the scope of submission by ruling on Petitioner's federal statutory rights under the ADA, and where the arbitrator was not an impartial decisionmaker because he was exclusively chosen by Petitioner's adversaries.

Respondent Solar Turbines attempts to restate the above questions in order to confuse and minimize their importance, and then concludes that they are of no interest to anyone except the parties involved. *See* Brief in Opposition (Opp.) i & 1-2. Petitioner contends that the questions presented are of substantial importance to disabled individuals in the workplace. Without Supreme Court intervention lower courts can apply arbitrary standard in determining whether an individual is substantially limited in the ability to

work and disabled individuals will not receive the intended protections afforded by the ADA.

Therefore, Supreme Court intervention is needed to set clear consistent standards and guidelines for determining whether an individual is substantially limited in the ability to work. Additionally, this Court should grant review to resolve the misapplication of the Federal Rule of Evidence 702 and clarify the standards by which it is applied in an ADA case. Finally, intervention by the Supreme Court is necessary to resolve the direct conflict with the Supreme Court's decisions in *Teachers v. Hudson*, 475 U.S. 292, 307–308 (1986) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974). These conflicts were created when the Ninth Circuit held that the district court did not err by considering the arbitrator's decision. This ruling conflicts with the above Supreme Court decisions because the arbitrator exceeded the scope of submission by ruling on Petitioner's federal statutory rights under the ADA, and because the arbitrator was not an impartial decisionmaker due to the fact he was exclusively chosen by Petitioner's adversaries.

I. INTERVENTION BY THE SUPREME COURT IS NEEDED TO CLARIFY THE STANDARDS AND GUIDELINES FOR DETERMINING WHETHER AN INDIVIDUAL IS SUBSTANTIALLY LIMITED IN THE ABILITY TO WORK

The Ninth Circuit panel held that, "Enright's letters from examining physicians and occupational rehabilitation and retraining records show some level of impairment, but they do not show a substantial limitation on his ability to engage in work." Pet. App. 4a. This decision by the panel is contrary to the EEOC's interpretive guidance presented in its

Compliance Manual under Section 902 *Definition of the Term "Disability"* which was last modified February 1, 2000. Pet. App. 35a-45a. If this EEOC interpretive guidance had been properly considered the panel would have concluded that Enright is substantially limited in his ability to work. *See* Pet. 14-21.

Solar Turbines concedes that there is an "open question surrounding what constitutes a 'disability' under the Americans with Disabilities Act, 42 U.S.C. § 12102 et seq., based on the guidelines put forth by the EEOC." Opp. 2-3. Then Solar Turbines states that, "The Ninth Circuit, for example, seemingly accepts the EEOC's regulatory guidelines (see *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, *clarified*, 292 F.3d 1045 (9th Cir. 2002)) ...". Opp. 3. This is precisely the problem; it is unclear what standards the Ninth Circuit Court uses to determine whether an individual is disabled under the ADA. The lower courts do not have clear standards and guidelines by which to determine whether an individual is substantially limited in their ability to work. Therefore, this Court should grant review to clarify the standards and guidelines for determining whether an individual's impairment substantially limits their ability to work.

II. SUPREME COURT REVIEW IS NECESSARY TO CLARIFY THE STANDARDS BY WHICH THE FEDERAL RULE OF EVIDENCE 702 IS TO BE APPLIED IN ADA CASES

Solar Turbines attempts to suggest that the only issue regarding Mark Remas' vocational evaluation report is the discretionary admissibility of expert testimony. Opp. 4-6. Petitioner contends that the key issue is whether Mark Remas qualifies as an expert witness under Federal Rule of Evidence 702. The Ninth Circuit held that, "Enright's vocational

rehabilitation counselor did not qualify as an expert witness under Federal Rule of Evidence 702." Pet. App. 4a. This decision overlooked the numerous qualifications of Mark Remas and the fact that he had "previously testified as a vocational expert in Social Security Administration hearings, Workers' Compensation Appeals Board actions, Department of Labor actions, dissolution proceedings and personal injury litigation; . . ." Pet. App. 69a-70a; Pet. 21-24. Additionally, the district court was exceptionally critical of Mark Remas' report, and concluded his "evaluation is insufficient to raise a genuine issue of material fact regarding whether Plaintiff is substantially impaired from working in a broad class of jobs." Pet. App. 13a-14a. The district court reached this decision despite the fact that Mark Remas' report concluded Petitioner had a "degree of disability of 29% of all occupations based on quantification of medical restrictions as a result of multiple chemical sensitivity". (Pet. App. 70a; see Pet. 24).

The above decision by the district court is contrary to the EEOC's interpretive guidance. The EEOC offers the following interpretive guidance under Section 902 *Definition of the Term "Disability"* for evaluating evidence in determining whether an impairment substantially limits an individual's ability to work:

> "The reference to the "number and types" of jobs is not meant to require an onerous evidentiary showing. 29 C.F.R. pt. 1630 app. § 1630.2(j). The reference does not mean that an individual must identify the exact number of jobs using similar or dissimilar skills in a certain geographic area. Further, the reference does not mean that an individual must count positions or otherwise present a precise number of jobs from which (s)he is disqualified because of an impairment. Instead,

> the reference to the "number and types" of jobs "only require(s) the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment." Id. Furthermore, in cases where it is clear that an individual is excluded from a class of jobs or a broad range of jobs in various classes, only minimal evidence will be required." Pet. App. 43a.

If the district court had used the above EEOC interpretive guidance, they would have concluded that Mark Remas' report meets these standards and is sufficient to raise a genuine issue of material fact as to whether Petitioner was substantially impaired from working in a broad class of jobs.

Therefore, this Court should grant review to resolve this misapplication of the Federal Rule of Evidence 702 and clarify the standards by which this rule is to be applied in the evaluation of evidence in ADA cases. Without Supreme Court intervention the lower courts can apply arbitrary standards and disabled individuals will not receive the intended protections afforded by the ADA.

III. SUPREME COURT REVIEW IS NEEDED TO RESOLVE THE DIRECT CONFLICTS WITH SUPREME COURT DECISIONS CREATED BY THE NINTH CIRCUIT'S RULING ALLOWING CONSIDERATION OF THE ARBITRATION DECISION

Solar Turbines states, "Petitioner asserts two claims, to wit, that the arbitrator was not impartial and went beyond the scope of his authority." ... "There

is no record, however, that Petitioner did not participate in the selection process." Opp. 7. Solar Turbines errs in contending that there is no record that Petitioner did not participate in the selection process. Petitioner, Paul Enright, in his sworn declaration states,

> "This arbitrator was chosen by Solar Turbines and Local Lodge 389 attorney David Rosenfeld. At the time that I was notified of the arbitration by David Rosenfeld in his letter of October 20, 2000, I had already filed suit against both Solar Turbines and Local Lodge 389. I had no input into the choosing of the arbitrator and contest the fact that he was an impartial arbitrator as stated by the Defendant." (C.A. ER 160; Pet. 8).

Therefore, the Ninth Circuit's decision to allow consideration of the arbitrator's decision conflicts with the Supreme Court decision in *Teachers v. Hudson*, 475 U.S. at 307-308 (1986). In *Teachers* the Court held that because the union had unrestricted choice of arbitrators from a state list the arbitrator was not an impartial decisionmaker for resolving conflicts between the union and its nonmembers. Based on this Supreme Court decision the arbitrator in Enright's case, who was exclusively chosen by his joint adversaries, was not an impartial decisionmaker. Thus, the Ninth Circuit should not have allowed consideration of the arbitrator's decision and review by this Court should be granted to resolve this conflict.

Solar Turbines submits that, "The arbitrator made it clear there was a nexus between the contractual issues and the statutory provisions on disability/discrimination. (Pet. 21a) It is for this reason the arbitrator ruled on the question of

disability. *Alexander* does not preclude this." Opp. 8. [*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974)]. Petitioner contends that *Alexander* specifically precludes the arbitrator under a collective bargaining agreement from ruling on Petitioner's federal statutory rights, even if certain contractual rights are similar to, or duplicative of those federal statutory rights. The Court in *Alexander* held as follows:

> "[i]f an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of submission,' and the award will not be enforced. Thus, the arbitrator has authority to resolve *only questions of contractual rights,* and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by [the federal statute] Title VII." *Alexander* at 53-54, (emphasis added) (citation omitted) (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)].

Therefore, since the arbitrator ruled on Enright's federal statutory rights the arbitrator's decision should not be enforced and should not have been considered by the district court. Thus, the Ninth Circuit's decision to allow consideration of the arbitrator's decision is in direct conflict the Supreme Court's decision in *Alexander*. The Supreme Court should grant review to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Enright
1194 Greenfield Dr.
El Cajon, CA 92021
Home (619) 447-4194
Pager (619) 682-2886

Pro Se Petitioner

March 14, 2003